

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte MARK WESTON FULLER

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Appeal No. 2004-1300  
Application No. 09/872,564

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ON BRIEF

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Before KIMLIN, GARRIS and WALTZ, Administrative Patent Judges.  
KIMLIN, Administrative Patent Judge.

REQUEST FOR REHEARING

Appellant requests rehearing of our decision of June 16, 2004 wherein we affirmed the examiner's rejection of claim 1 under 35 U.S.C. § 102(b) over Lux.

The basis of appellant's request is that the examiner improperly denied entry of the Declarations of Mark W. Fuller, the present applicant. However, as noted in our decision, the

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proper recourse for appellant upon receiving notice that the Declarations were denied entry was a petition. Certain matters, such as an examiner's refusal to enter an amendment or declaration after final rejection, are not within the scope of review of this Board. It is of no moment if, as contended by appellant, the examiner's first statement on the record denying entry of the Declarations is in the Examiner's Answer. The fact remains that the Board cannot consider declaration evidence that is not entered into the record in reaching a decision, nor can the Board direct the examiner to enter a declaration that has been refused entry. Manifestly, we cannot grant appellant's request to reverse the examiner's rejection of claim 1 based on declaration evidence that is not of record. Appellant had ample opportunity to clarify the status of the declarations after the examiner's Advisory Action of April 3, 2003 and, furthermore, appellant had the opportunity to petition the examiner's denial of entry of the Declarations after such denial was clearly articulated in the Examiner's Answer.

Accordingly, based on the foregoing, appellant's request is denied.

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No time period for taking any subsequent action in  
connection with this appeal may be extended under 37 CFR  
§ 1.136(a).

DENIED

EDWARD C. KIMLIN	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	
BRADLEY R. GARRIS	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
	)	
	)	
THOMAS A. WALTZ	)	
Administrative Patent Judge	)	

ECK:clm

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